

California State Mediation & Conciliation Service

In the Matter of an Arbitration

CSMCS. NO. 09-0707

Between

CITY OF OAKLAND and
OAKLAND POLICE DEPARTMENT,

ARBITRATOR'S DECISION AND AWARD

Employer,

V.

OAKLAND POLICE OFFICERS' ASSOCIATION
(Officer Hector Jimenez),

Union.

INTRODUCTION

This arbitration arises pursuant to the Memorandum of Understanding (hereinafter Agreement or MOU) between the CITY OF OAKLAND (hereinafter the City or Employer), the OAKLAND POLICE DEPARTMENT (hereinafter the Department) and the OAKLAND POLICE OFFICERS' ASSOCIATION representing Officer Hector Jimenez (hereinafter the Union or Association), under which DAVID GABA was selected to serve as Arbitrator, and under which his Award shall be final and binding among the parties.

A hearing was held before Arbitrator Gaba on November 1 through 4, 2010, in Oakland, California. The parties had the opportunity to examine and cross-examine witnesses, introduce exhibits, and fully argue all of the issues in dispute. A transcript of the proceedings was provided. Briefs were filed by the parties on January 26, 2011. A Supplemental Brief was filed by the City of Oakland on February 2, 2011.

APPEARANCES:

On behalf of the Union:

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On behalf of the City:

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ISSUE

The parties stipulated to the following issue: Did the City of Oakland have just cause to terminate Officer Hector Jimenez's employment? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The relevant sections of the parties' Memorandum of Understanding between the City of Oakland and the Oakland Police Officers' Association effective July 1, 2006, through June 30, 2013, read in part:

ARTICLE II MANAGEMENT RIGHTS

A. General

The City retains and reserves all the rights, power, authority, duty, responsibility, and obligations conferred on and vested in it by its Charter and by the laws and Constitutions of the State of California and the United States of America.

The City reserves its right to determine matters outside the scope of representation.

The City reserves its right to propose changes in wages, hours, and other terms and conditions of employment not covered by this Agreement, in accordance with the provisions of Charter Section 910 and this Agreement.

Except as limited by Charter Section 910 and by the specific provisions of this Agreement, the City retains all rights, powers, and authority granted to it by law or the Charter, including, but not limited to, the exclusive right to determine the merits, necessity, and organization of any service or activity the City may now or hereafter provide; to determine the City's mission and the mission of the Police Department and its employees, and to assign work to, direct, and schedule employees; to set standards of service; to determine the methods, means, and personnel by which the City will conduct its operations; to finance City operations and to determine financing methods; to establish and enforce reasonable dress and grooming standards and to determine the style or type of City-issued apparel, equipment, and technology; and to take all actions necessary to carry out its mission and these reserved rights.

Except as expressly provided in this Agreement, neither the City nor the Union concede or relinquish its rights under Charter Section 910.

ARTICLE X GRIEVANCE PROCEDURE

A. Definition

A grievance is hereby defined as any dispute which involves the interpretation or application of this Agreement; or disciplinary action taken against an employee, or controversy concerning the application of Departmental rules or general orders which are within the scope of bargaining.

It is the expressed intent of the parties that employees shall receive fair treatment and shall be disciplined only for just cause. Grievances shall be resolved expeditiously and at the lowest possible administrative level. No grievance filed by an employee, pursuant to the provisions of this Article, may be resolved inconsistent with the terms of this Agreement.

C. Procedure

1. Step 1 Initial Procedure

a. Informal Discussion

The employee or the Association representative may present the grievance orally to the immediate supervisor within seven (7) calendar days from such time as the employee or Association should reasonably have been aware of the occurrence of the incident giving rise to the grievance. The supervisor shall provide his/her response within seven (7) calendar days following the informal discussion.

b. Formal Submission

Should the grievance remain unresolved, the employee or Association representative may submit the grievance, in writing and on a form provided for that purpose, to the employee's Bureau Chief. The formal submission shall be made within seven (7) calendar days of the supervisor's response to the informal presentation of the grievance, or, if no response is received, at the conclusion of the seven (7) day period provided for informal discussion. The grievance shall state the specific section of the Memorandum of Understanding, the Personnel Rules, or departmental rules or orders alleged to be violated, or the disciplinary action taken, and the proposed solution. The Bureau Chief shall render a decision in writing to the employee and/or Association within seven (7) calendar days of receipt of the formal submission of the grievance. Copies of all written grievances filed by employees shall be provided to the Association within a period not to exceed five (5) calendar days. Copies of responses thereto shall also be provided to the Association.

2. Step 2 Appeal to Department Head

Should the grievance remain unresolved, the employee or Association representative may, within seven (7) calendar days of receipt of the Bureau Chief's decision, submit the grievance in writing to the Chief of Police. The Chief, or his/her designated representative, shall respond to the grievance in writing within seven (7) calendar days after receipt of the grievance. It is understood that nothing shall preclude the Association from presenting a grievance to the Chief of Police if it is deemed that such action is warranted by the nature or circumstances of the grievance.

3. Step 3 Employee Relations Officer – Association Representative

Should the grievance remain unresolved, the employee or Association representative may, within seven (7) calendar days after receipt of the department head response, submit the

grievance in writing to the Employee Relations Officer. The Employee Relations Officer, or a designated representative shall contact the employee or representative within seven (7) calendar days of receipt of the grievance to schedule a meeting to attempt to resolve the dispute.

The Employee Relations Officer or designee shall respond in writing to the grievance within thirty (30) days after the third step hearing. If the Employee Relations Officer fails to respond within the thirty (30) days, the Association may move the grievance to the next step.

4. Step 4 Conflict Resolution Process

The City and the Association encourage grievant(s) to attempt to resolve grievances through informal means. Either party to the grievance may request an informal resolution conference. The conference shall be attended by the individual grievant(s), a representative from the OPOA and the Director of Personnel or his/her designee. Said conference shall be convened within ten (10) working days of the request initiated by either party. Participation in, or refusal by either the grievant(s), the OPOA or the City to participate in the conference, as well as any evidence, discussions, documents, statement, findings, recommendations, awards, orders, or any other record of the conference, shall not be presented as evidence, nor referred to any appeal or hearing by the grievant(s), Association or the City. In the event that all parties agree, they may request the assignment of a mediator from the State Mediation and Conciliation Service to assist in the informal resolution process.

No documentation regarding the Step Four (4) process shall be placed in any personnel file or other official file maintained for the purpose of making personnel decisions.

While the parties are utilizing the conflict resolution process set forth in Step Four (4), the parties may agree to extend the time limits described in Section D of this Article by no more than forty-five (45) days.

5. Step 5 Civil Service Board/Arbitration

Should the grievance remain unresolved, either the City or the Association may, within fourteen (14) calendar days of the third step response, submit the grievance to an impartial arbitrator who shall be selected by mutual agreement or, if such agreement is not reached, by alternately striking names from a list of seven (7) arbitrators to be developed by the parties. In the absence of agreement on a list of arbitrators, the parties will request a list from the California State mediation and Conciliation Service.

In accordance with Civil Service Rules, the employee or Association may elect to submit a grievance concerning a suspension, fine, demotion or discharge to the Civil Service Board in lieu of arbitration. Such election is irrevocable.

If the Civil Service Board is selected, appeals shall be handled in accordance with the procedures established in the Personnel Ordinance and as modified by Appendix C of this Memorandum of Understanding.

If arbitration is selected, it is agreed that the decision of the arbitrator shall be final and binding on all parties and that the arbitrator's fees shall be borne equally by the parties. It is expressly understood that the arbitrator shall have no power or authority to add to or subtract from the provisions of this Agreement or departmental rules or general orders; provided that, if any inconsistency between this Agreement and any of the foregoing rules or orders exists, this Agreement shall prevail.

Notwithstanding the above, the option of arbitration may not be elected in grievances filed by probationary employees in entry level positions whose basis *is* failure to successfully complete the probationary period, or Police Officer Trainees who are removed from employment for failure to successfully complete the Recruit School.

Unless otherwise agreed to by the employee, in writing, all meetings and hearings for any disciplinary matter shall be private and confidential, and shall include only the parties and exclusive representatives.

D. Time Limits

Time limits prescribed in Section C above may be modified by mutual agreement of the City and Association. Failure by the employee or Union to follow time limits, unless so extended, shall nullify the grievance. Failure by the City to follow the limits, unless so modified, shall cause the grievance to advance to the next step.

Steps One (1) and Two (2) may be waived by mutual agreement between the Association and the Department.

E. Immediate Dispute Resolution

1. In the event there is a dispute regarding the interpretation or application of this Agreement that imminently affects the City's interests, the Association, or a substantial number of members represented by the Association, either the City or the Association may upon written notice request suspension of the grievance process as described in Section (c) of this Article and proceed to immediate resolution discussions with the Chief of Police, the Employee Relations Officer, and an Association Representative. Such informal labor-management discussions shall be concluded within thirty (30) days of the date of the initial request for same.
2. Should the dispute still not be resolved within the thirty (30) day period, the parties have an additional fifteen (15) days to select an arbitrator from the panel of four (4) professional neutral arbitrators to be identified by the parties. The arbitrator assigned to hear the merits of the case will hold a hearing that is no longer than one (1) day and issue a decision within forty-five (45) calendar days of the selection of the arbitrator. The timelines or length of hearing may be shortened or extended by mutual agreement or upon an arbitrator's ruling on a request for an order shortening or extending time.

3. The arbitrator shall have no power to add to or to subtract from the provisions of this Agreement, the Personnel Rules, or departmental rules or orders in rendering his/her award.
4. The informal labor-management discussions will not automatically stay the City's action. However, the Association may demand a cease and desist order at any time upon invocation of the IDR process. If the Association makes such a demand, the first arbitrator from the list of four (4) professional neutral arbitrators, selected at random, that is available within a forty-eight (48) hour period shall hear the request for a temporary cease and desist order. The arbitrator shall have the authority to issue a temporary cease and desist order to stay, the implementation of the proposed change upon a proper showing of irreparable harm and inadequacy of normal grievance procedure remedies.
5. It is expressly understood and agreed that the provisions of this Section shall not be invoked for actions involving employee disciplinary actions or individual grievances.

H. Grievances that Involve Appeal of Discipline

Appeals of written reprimands shall be initiated at Step One (1). Appeals of fines, demotions, suspensions and termination may be initiated at Step Three (3), following completion of the Skelly process.

Other pertinent authority includes the Oakland Police Department General Rules, which include in part the following:

OAKLAND POLICE DEPARTMENT GENERAL ORDER K-3 USE OF FORCE

The purpose of this order is to set forth Departmental policy and procedures for the use of force by Department personnel.

The Oakland Police Department values the protection and sanctity of human life. This policy prohibits personnel from using unreasonable force. It also prohibits personnel from using force as a means of interrogation or punishment. This policy requires personnel to intervene in situations where they reasonably believe, based on the totality of the circumstances, that other personnel are subjecting a person to unreasonable force. This policy is more restrictive than state or federal laws that govern the use of force, and members are required to accomplish the police mission by adhering to this policy.

Personnel who use unreasonable force are subject to discipline for violating Departmental policy. Federal and state laws also provide for civil liability and possible criminal sanctions against personnel who use unreasonable force.

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Definitions

D. Imminent Threat

"Imminent threat" refers to an impending threat or resistance that a member or employee reasonably believes will occur, based on the totality of circumstances. Imminent is not limited to "immediate" or "instantaneous." A person may pose an imminent threat even if that person is not pointing a weapon at the member or employee. A person is an imminent threat if the person is reasonably perceived by a member or employee to have the present **intent, means, opportunity, and ability** to complete the threat, regardless of whether the threatened action has been initiated.

1. Intent: The subject's apparent desire, which can be indicated by words, body language, or actions.
 2. Means: The instrument, mechanical or physical, that may be used to cause injury.
 3. Opportunity: The time and/or place which allowed the subject to use the means to cause injury.
 4. Ability: The subject has the capability to carry out the action or threat.
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K. Reasonable Force

Force that is objectively reasonable based upon the totality of the circumstances.

The standard used to determine objectively reasonable force is articulated in the United States Supreme Court decision, *Graham v. Conner*, 490 U.S. 386 (1989). The *Graham* decision holds that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, without regard to the officer's underlying intent or motivation. The determination of the reasonableness must be based on the totality of circumstances and must include a consideration that police officers are often forced to make split second decisions in circumstances which are tense, uncertain, and rapidly evolving. The determination of reasonableness is not based on the 20/20 vision of hindsight.

Personnel are not required to use the least assertive option and shall consider the following criteria when determining which level of force to use:

1. The objectively reasonable perception of a threat to the member, employee or third party.
2. Imminence of the threat to the member, employee, or third party;
3. Physical differences (e.g., age, size, relative strength, skill level, injuries, exhaustion, number of members/employees versus subjects);
4. Influence of drugs or alcohol on the subject;
5. Proximity of weapons to the subject;
6. Availability of other options;

7. Seriousness of suspected offense(s);
8. Training and experience level of the member or employee;
9. Potential for injury to member, employee, third party, or the subject;
10. Risk of escape; and
11. Other exigent circumstances.

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II. Use of Force Policy

Departmental policy requires personnel to use only a force option that is objectively reasonable based on the totality of circumstances confronting them.

A. Lethal Force

1. Lethal Force is authorized to defend the member or a third person from what the member reasonably believes is an imminent threat of lethal force or force likely to cause serious bodily injury...
2. Lethal Force is prohibited when its sole purpose is to prevent a subject from escaping and the subject does not present an imminent danger of death or serious bodily injury.

The parties' Training Bulletin, Index Number III-B-2 dated September 18, 2001, reads in part:

High Risk Vehicle Stops

Definition: A high risk vehicle stop is a vehicle stop of a person or persons suspected of having committed a serious crime.

A high risk vehicle stop is unpredictable; it is never routine. Officers should consider any high risk suspect to be armed until they have personally assured themselves otherwise.

When a suspect in a high risk vehicle stop resists arrest, an officer may resort to reasonable physical force in compliance with General Orders K-3 and K-4.

...

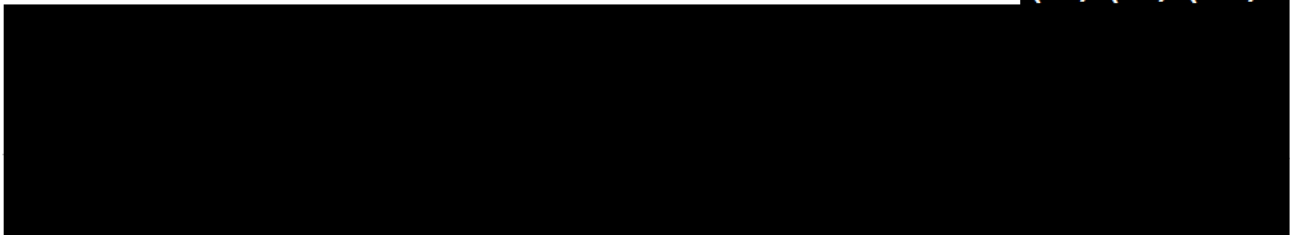
During this movement, look for any bulges or areas where a weapon could be concealed. Pay particular attention to the suspect's waistband.

FACTS

Parties

The City of Oakland is the eighth-largest city in the State of California. The Mission of the Department is to provide the people of Oakland an environment where they can live, work, play, and thrive free from crime and the fear of crime. The City currently employs approximately 650 full-time police officers.

This case involves a 24-year-old police officer, Hector Jimenez, who was employed by the Department as a sworn peace officer. Officer Jimenez began his career with the Oakland Police Department as a police cadet in 2007. As both a cadet and police officer, Officer Jimenez underwent significant training. At the time of his termination on or about June 4, 2009, Officer Jimenez had been employed as a police officer for approximately two years. (b)(5)(C)



Background

Officer Jimenez received training at the police academy on various subject matters including vehicle pull-over techniques, stops, the use of lethal force, and policy regarding high-risk car stops. Officers are taught that car stops are the second most dangerous activity a police officer can engage in. Officer Jimenez, through the Department's high-risk car stop policy, was taught that he is to assume that suspects in high-risk car stops are armed until he can personally assure himself otherwise.

The Incident

The following facts are not in dispute. On July 25, 2008, Officer Jimenez was working patrol with his regular partner, Officer Joel Aylworth. Officers Jimenez and Aylworth were working a 12-hour shift from 5 p.m. to 5 a.m. During their shift, and prior to the incident that is the subject of this arbitration, Officers Jimenez and Aylworth assisted with the investigation of two armed robberies by canvassing for suspects and witnesses. The suspects in those robberies were three African-American males and a Laotian male. None of the robbery suspects had yet been apprehended. In addition to the robberies, two homicides were reported that night in East Oakland.

At approximately 3:30 a.m. on July 25, 2008, Officer Jimenez was riding in patrol car 1706 with Officer Aylworth, who was driving. As they traveled south on Fruitvale Avenue, near Glendale Avenue, they observed a red Buick traveling north on Fruitvale Avenue in excess of the speed limit. When Officer Jimenez saw the Buick speeding, he conferred with Officer Aylworth who agreed that the Buick appeared to be speeding.

Officer Aylworth and Officer Jimenez decided that they would pull the vehicle over for the traffic violation. Officer Aylworth made a U-turn so that they could get behind the vehicle to pull it over. A van was between their patrol car and the Buick, but Officer Aylworth shifted the patrol car in their lane so that Officer Jimenez could maintain sight of the Buick and observe its driving pattern. Officer Jimenez saw that the Buick was weaving within its lane, straddling the lane markers, and was speeding up and slowing down. Officer Jimenez, based on his training and experience, concluded that the driver was under the influence of alcohol or drugs due to his driving pattern.

Once the van pulled to the side, Officer Aylworth pulled his patrol car directly behind the Buick and the patrol car's emergency lights were activated in an effort to get the Buick to yield to the right. The Buick slowed and pulled to the right as if it were going to stop for the officers; the Buick then abruptly made a U-turn and sped off on southbound Fruitvale Avenue at a high rate of speed. When the Buick drove past the patrol car, Officer Jimenez observed the driver to be an African-American male who was sweating. Officer Jimenez thought that was unusual as it was 3:30 a.m., the temperature was cool, and the driver's window was down. Officer Jimenez believed that the driver's sweating on a cool early morning was further indication that he was under the influence of alcohol or drugs. Tests later showed that the driver, Mr. Jody Mack Woodfox, was under the influence of a number of drugs including, but not limited to, cocaine, ecstasy, and alcohol.¹

When the Buick began evading the officers, Officer Jimenez became concerned because he had been trained that suspects who flee the police in vehicles could be armed or could have committed a crime more serious than a traffic violation. After the Buick made its U-turn and sped off, Officer Aylworth began following the Buick. As the officers gave chase, Officer Jimenez observed the Buick weave into the opposite lane of traffic, increase its speed to approximately 60 miles per hour, and run red lights at East 27th Street and Fruitvale Avenue and Foothill Boulevard and Fruitvale Avenue. The Buick then appeared to make a left-hand turn

¹ The Drug Screen administered by the coroner found: "Ethyl Alcohol, Cocaine and MDMA detected.

Blood Ethyl Alcohol	= 0.14 grams%	Urine Ethyl Alcohol = 0.207 grams%
Cocaine	= 0.49 mg/L	*MDMA = 0.36 mg/L
Benzoyllecgonine	= 1.22 mg/L	**MDA = 0.05 mg/L
***Cocaethylene	= Present in blood"	

*MDMA (Methylenedioxymethamphetamine); colloquially known as ecstasy.

**MDA (Methylenedioxyamphetamine); also known as amphetamine (INN). MDA is a psychedelic, stimulant, and empathogen-entactogen of the phenethylamine and amphetamine chemical classes. It is mainly used as a recreational drug, and is known as "Sass", "Pink", or "Yop."

***Cocaethylene (ethylbenzoyllecgonine) is the ethyl ester of benzoyllecgonine. It is structurally similar to cocaine, which is the methyl ester of benzoyllecgonine. Cocaethylene is formed in vivo when cocaine and ethyl alcohol have been ingested simultaneously.

onto the eastern portion of the staggered intersection of East 17th Street and Fruitvale Avenue, then swerved to the right, coming to an abrupt stop at the western corner of the staggered intersection of East 17th Street and Fruitvale Avenue.

The Buick's evasive course of action elevated the type of stop from a traffic enforcement stop to a high-risk car stop. When the Buick stopped, Officer Aylworth was unable to maneuver the patrol car into proper high-risk car stop position, instead stopping directly parallel and very close to the suspect vehicle and putting Officer Jimenez in a position for which he was not trained as part of his high-risk car stop training. The patrol car was so close to the Buick that Officer Jimenez was unable to open the door to exit the car. As the patrol car came to rest parallel to the suspect vehicle, Officer Jimenez looked directly to his right and made eye contact with Mr. Woodfox, who was sitting in the driver's seat of the suspect vehicle. The suspect vehicle began to slowly roll forward and Officer Jimenez, whose door was no longer obstructed by the suspect vehicle, exited the patrol car at his first opportunity.

What happened next is in dispute and occurred in a matter of seconds. The moment Officer Jimenez exited the patrol car, he began issuing commands to Mr. Woodfox to show his hands. As Officer Jimenez exited the patrol car, he drew his service weapon, per his training, and prepared for a foot chase by going around the door of the patrol car and positioning himself between the crease of the passenger-side door and the passenger-side wheel well, close enough to reach out and touch the patrol car.

The City argues that "Woodfox got out of the car and ran toward the opposite side of the street." However, a totality of the evidence indicates that Mr. Woodfox ran northeast toward Officer Aylworth. Specifically, Mr. Woodfox exited the suspect vehicle, took two to three steps in a northeasterly direction toward the driver's side of the patrol car, looked over his left

shoulder toward the area where Officer Jimenez was positioned, and placed his right hand into his waistband area. During this time, Officer Aylworth had some difficulty exiting the patrol car (Officer Jimenez does not wear a seatbelt while on patrol, while Officer Aylworth does). Officer Jimenez believed that Mr. Woodfox was advancing on his partner's position and accessing a firearm from his waistband to shoot one of the officers. Likewise, a reasonable officer standing in Officer Jimenez's position would have believed that the suspect was advancing on his partner's position and may have been accessing a firearm from his waistband to shoot his partner or himself. Officer Aylworth was either getting out of the police car or had just exited. In his initial Recorded Statement, Officer Aylworth stated that: "Woodfox took two steps eastbound and slightly toward the north and immediately made a motion with both hands to his waistband," and he was "concerned that the suspect was running in his direction."

In response to what he perceived as a deadly threat, Officer Jimenez discharged his firearm four to five times at Mr. Woodfox in an attempt to stop him. Prior to discharging his weapon, Officer Jimenez issued two to four sets of commands for Mr. Woodfox to show his hands. When Officer Jimenez discharged the first four to five rounds, he remained close enough to reach out and touch the patrol car, between the crease in front of the passenger-side door of the patrol vehicle and the passenger-side wheel well.

When Officer Jimenez discharged the initial volley from his firearm, Mr. Woodfox was four to five feet from the passenger-side headlamp of the patrol car and moving closer to Officer Aylworth's position. As Mr. Woodfox advanced, his right hand was in his waistband area and the left side of Mr. Woodfox's body was exposed to Officer Jimenez. Mr. Woodfox's position prevented Officer Jimenez from being able to see the right side of Mr. Woodfox's body and his right hand.

Officer Aylworth, who was at a different vantage point on the driver's side of the patrol car looking at Mr. Woodfox head-on, did not discharge his weapon. Officer Aylworth reported that from where he was, he was able to see Mr. Woodfox's hands after he saw what he believed to be Mr. Woodfox reacting from being struck by bullets. Officer Aylworth was located behind the driver's-side door of the patrol car, behind the patrol car's emergency lighting system.

Officer Jimenez had not expected that Mr. Woodfox would run in the direction of his partner as Mr. Woodfox had other open avenues of escape, such as south on Fruitvale Avenue or east across the street. In Officer Jimenez's experience, suspects who are attempting to flee typically run in the opposite direction of the police. Likewise, a reasonable officer would believe that a suspect attempting to flee would run in the opposite direction of the police. After Officer Jimenez discharged the first round of shots, Mr. Woodfox did not put his hands up in surrender nor did Mr. Woodfox go to the ground to take cover. Mr. Woodfox was parallel with the driver's-side bumper of the patrol car, with the right side of his body still not visible, and close enough to touch the patrol car when Officer Jimenez discharged his second volley of shots. Mr. Woodfox then fell to the ground. A search of Mr. Woodfox's body produced no weapon and he was later pronounced dead at the scene.

Officer Jimenez estimated that two seconds elapsed between the time Mr. Woodfox set foot on the pavement after exiting his vehicle and when he fell to the ground. The totality of the facts show that no more than three seconds elapsed from the time Mr. Woodfox exited the Buick until he collapsed after being shot by Officer Jimenez (it is more likely than not that approximately 2.6 seconds elapsed from the time Mr. Woodfox exited the car until he collapsed after being shot by Officer Jimenez). Minutes after the shooting, Officer Jimenez and Officer Aylworth were separated and each told their supervisor, Sergeant Paul Balzouman, what had

transpired. Officer Jimenez then told Sergeant Balzouman that Mr. Woodfox turned his body and head to the left, and put his hands in his waistband area as Officer Jimenez was issuing commands, whereupon, Officer Jimenez, believing Mr. Woodfox was retrieving a weapon, began discharging his firearm at Mr. Woodfox. Sergeant Balzouman authored a supplemental report in which he included the description of the events provided by Officer Aylworth and Officer Jimenez.

The Investigation

Sergeant Henderson Jordan and Sergeant Tom Schaffer of Internal Affairs were assigned to investigate the shooting. They reported to the scene and met with the homicide investigators, Sergeant Tony Jones and his partner Sergeant Derwin Longmire, as well as the patrol captain, Captain Carlo Orozco, and were provided with a synopsis of the incident that occurred.

As part of the investigation, Sergeant Jordan reported that both Officer Aylworth and Officer Jimenez were interviewed, as well as thirty-six (36) residents of the neighborhood who were contacted during a police canvass and who gave statements saying they heard only gunshots. Seventeen (17) other residents contacted during the canvass gave statements saying that they didn't hear or see the incident. On August 15, 2008, Sergeant Jordan conducted a supplemental canvass of the subject neighborhood attempting to contact residents who were not interviewed during the initial canvass.

There is no question that Officer Jimenez subjectively thought Mr. Woodfox posed a danger to Officer Aylworth. At the hearing, Sergeant Jordan testified:

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- 4 Q. And it appears from Officer Jimenez's
- 5 perspective that Mr. Woodfox is running in a
- 6 northeasterly direction towards the general direction
- 7 of where his partner would be located in the police
- 8 vehicle, correct?

9 A. Yes, sir.

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24 Q. Can you see how a police officer faced with
25 a split-second decision might interpret the suspect's

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1 path as being towards the driver's side of the vehicle?

2 A. Yes.

3 Q. Because he doesn't have much time to make
4 the decision, does he?

5 A. No.

6 Q. And in his mind it was a life and death
7 decision, wasn't it, in Officer Jimenez's mind?

8 A. According to his testimony, yes -- or his
9 statement, yes.

10 Q. Do you have any reason to disbelieve that he
11 believed it was a life and death situation?

12 A. No.

Sergeant Jordon's December 12, 2008, Investigative Report Memorandum to the Executive Force Review Board (EFRB) addressed the issue of whether Officers Aylworth and Jimenez had a legal right to detain Mr. Woodfox. Sergeant Jordan stated:

Reasonable suspicion (a crime had occurred, was occurring, or was about to occur) had been met. Woodfox committed a vehicle code violation and failed to pull over as directed by Aylworth and Jimenez's emergency lights and siren. Woodfox fled from a lawful vehicle enforcement stop. Woodfox was required to identify himself to Aylworth and Jimenez but instead chose to flee. Woodfox's flight constituted a violation of PC 148(a) - Resist/Delay/Obstruct a Peace Officer and CVC 2800.1 - Evading a peace officer. Accordingly, the officers had a legal right to detain Woodfox.

Sergeant Jordan concluded in the Investigative Report Memorandum that:

Based on the statements taken, and the known actions of Woodfox, it is reasonable to conclude Jimenez is being truthful regarding his perception of the events. However, based on all of the evidence it is reasonable to conclude Jimenez's decision to shoot was not reasonable without more articulated facts. Jimenez's actions were not reasonable and did not comply with Departmental policy.

Sergeant Jordon's Investigative Report was extremely well done and the quality of his prose was excellent. However, Sergeant Jordon had to rely on the investigations and reports of others to compile his report.

The Executive Force Review Board met on January 6, 2009. In a report dated January 26, 2009, the EFRB found:

The members of the Board determined that the statements of the officers, witnesses, materials presented, and information provided by the Internal Affairs investigator were sufficient to render a finding.

The Board voted that the initial rounds fired by Jimenez were "**Not Compliant with Policy**" in accordance with the provisions of Departmental General Order K-3 (Use of Force). (Kozicki/Israel- Not in Compliance, Loman - In Compliance)

The Board voted unanimously that the second series of rounds fired by Jimenez were "**Not Compliant with Policy**" in accordance with the provisions of Departmental General Order K-3 (Use of Force)."

In a letter from Chief of Police Wayne G. Tucker to Officer Jimenez dated February 13, 2009, Chief Tucker stated that it was his intent to recommend to the City Administrator that Officer Jimenez be terminated from his position as a police officer with the Oakland Police Department as a result of the Internal Affairs Division investigation, which revealed "that you used excessive force when you shot and killed a person on July 25, 2008." Mr. Tucker stated that these actions violated Section 370.27-1, Use of Physical Force-Level 1 Lethal Firearm Discharge. Mr. Tucker further stated that Officer Jimenez had the right to respond orally or in writing to the facts on or before March 25, 2009.

Officer Jimenez was terminated on June 4, 2009. The parties subsequently proceeded to arbitration.

Facts at Issue

Which Way Did Mr. Woodfox Run?

In its brief, the City posits that: "Woodfox got out of the car and ran toward the opposite side of the street." The City further posits that "Woodfox did not retrieve a weapon from his waistband and continued to run away from Aylworth." If either of the preceding statements were true, then either Mr. Woodfox would be alive today, or in the alternative, Officer Jimenez should be discharged from his employment.

The problem with the City's "facts" is simply that the evidence does not support them. In looking at the totality of the evidence, I have discounted the testimony of Officer Jimenez due to his obvious interest in the outcome of this matter. However, Officer Aylworth was clear in his sworn deposition testimony that Mr. Woodfox was running towards him at the time he was shot. As stated by Officer Aylworth:

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- 9 MR. CHANIN: Q. So with that - - thank you. With
10 that I'd like you to turn page OAK749.
11 We're on there. Okay.
12 And the first thing that it says is - there is
13 three kind of bullet points here, "Woodfox was running
14 away from the police car and did not turn in the
15 direction of Aylworth."
16 Is that correct?
17 A. No, that's not correct.
18 Q. Okay. What is not correct about it?
19 A. He was running towards my direction.

93

- 3 Q. And I'd like to go back to number 749, same
4 exhibit that we've been working with, which is
5 Exhibit 6.
6 A. Six.
7 Q. Okay. There is - - the third little point they're
8 making here is, "The distance between Aylworth and
9 Woodfox was increasing as he ran away."
10 Is that a correct statement?

11 A. No, it's not correct.
12 Q. What's not correct about it?
13 A. Woodfox was getting closer to me.
14 Q. Okay. When?
15 A. During this course of flight.
16 Q. Okay. At any time before the second -- there
17 were two volleys of shots.
18 Is that correct?
19 A. Correct.
20 Q. At any time before the second volley of shots was
21 fired, was the distance between you and Mr. Woodfox
22 increasing?
23 A. Woodfox was getting closer to me.
24 Q. At the time the second shots were fired, he was
25 getting closer to you?

94

1 A. Correct.
2 Q. So there was no time between the -- strike that.
3 There was no time prior to any shots being fired
4 where Mr. Woodfox was running away from you?
5 A. Correct.

Officer Aylworth's testimony was corroborated by the statements of both himself and Officer Jimenez shortly after the incident, as well as the majority of forensic evidence at the scene.

DECISION

I. Burden of Proof

It is axiomatic in disciplinary administrative proceedings that the burden of proving the charges rests upon the party making the charges.² The obligation of a party to sustain the burden of proof requires the production of credible evidence for that purpose and an employer does not meet that burden by simply placing charges before the fact finder and claiming that it established a "prima facie" case.³

² *Parker v. City of Fountain Valley*, 127 Cal.App.3d 99, 113 (1981).

³ *Id.*; see also *Los Angeles Police Protective League v. City of Los Angeles*, 102 Cal.App.4th 85 (Cal. App. 2 Dist. 2002).

The burden is not on the employee to refute the charges made.⁴ An independent decision maker must make factual findings subject to judicial review. Rather, the independent fact finding implicit in the concept of an administrative appeal requires, at a minimum, that the hearing be treated as a de novo proceeding at which no facts are taken as established and the proponent of any given fact bears the burden of establishing it.⁵

The law requires that the appointing power bears the burden of proof by a preponderance of evidence that the employee engaged in the conduct on which the disciplinary charge is based and that such conduct constitutes a cause of discipline under the applicable statutes.⁶ In addition to the burden of proof being placed on the appointing or charging party, the employee may further avoid the adverse action by establishing that the conduct was justified or not inappropriate.⁷ In the matter at hand, it is the Department's burden of proving, by a preponderance of the credible and admissible evidence, each separate charge against Officer Jimenez.

II. Did Officer Jimenez Violate OPD General Order K-3, Use of Force When he Shot Mr. Woodfox?

General Order K-3, *Use of Force* explains the Department's policy regarding Lethal Force as follows:

1. Lethal force is authorized to defend the members or a third person from what the member reasonably believes is an imminent threat of lethal force or force likely to cause serious bodily injury; or
2. To apprehend or arrest a person whom the member reasonably believes has committed or is committing a violent felony which involves the

⁴ *Steen v. Bd. of Civil Serv. Comm'rs*, 26 Cal.2d 716 (1945); *Fukuda v. City of Angels*, 20 Cal.4th 805 (Cal. 1999) (public agency must produce evidence of misconduct by the employee; the employee has no burden to produce evidence that no misconduct occurred).

⁵ *Caloca v. City of San Diego*, 102 Cal.App.4th 433 (2002).

⁶ *Steen v. City of Cathedral City*, 31 Cal.2d 542, 547 (1948); *Parker v. City of Fountain Valley*, 127 Cal.App.3d 99, 113 (1981).

⁷ See *Skelly v. State Personnel Bd.*, 15 Cal.3d 194, 204, n.19 (1975); *Calif. Correctional Peace Officers Ass'n. v. State Personnel Bd.*, 10 Cal.4th 1133 (1995).

use, or threatened use coupled with the apparent ability to carry out the use of lethal force or force likely to cause serious bodily injury; and

- a. The person indicates by his or her conduct or by any other means that he or she presents an imminent danger of death or serious bodily injury to the member or a third person if not immediately apprehended, and
- b. All other reasonably available means of apprehending the person have failed, are inadequate, or are immediately unavailable.

The policy defines an “imminent threat” as someone who is “reasonably perceived by a member or employee to have the present intent, means, opportunity, and ability to complete the threat.” As Mr. Woodfox was not committing a violent felony, Officer Jimenez could only use lethal force to “defend the members or a third person from what the member reasonably believes is an imminent threat of lethal force...”

The Department’s use of force policy, with regard to lethal force, is extremely well written and consistent with the tenets set forth in the leading use of force decision, *Graham v. Connor*.⁸

Graham instructs that a use of force by a police officer is analyzed under the Fourth Amendment’s objective reasonableness standard.⁹ An objective reasonableness inquiry takes into account the totality of the circumstances known to the officer at the time the use of force was exacted, regardless of the officer’s underlying intent or motivation.¹⁰ A simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern. *Bryan v. MacPherson*, 608 F.3d 614, 618 (9th Cir. 2010).

⁸ *Graham v. Connor*, 490 U.S. 386, (1989).

⁹ *Id.* at 395.

¹⁰ *Id.* at 396-397.

A. Was it Reasonable to Perceive Mr. Woodfox as Having the Intent to Threaten Officer Aylworth?

The City defines "intent" as: "The subject's apparent desire, which can be indicated by words, body language, or actions." In the instant case, the perceived "intent" of Mr. Woodfox would be very different depending on when or where he was shot.

Sergeant Jordan in his report found:

Woodfox's car had what appeared to be a fresh bullet strike mark on the trunk lid above the bumper. The angle of the strike mark appears to indicate that Jimenez fired at least one round in the direction of the "V" of the driver's side door of Woodfox's car.

In its brief, the City argues:

The physical evidence at the scene confirms that Jimenez started shooting at Woodfox soon after Woodfox got out of his car. A bullet strike mark on the trunk of Woodfox's car is consistent with Aylworth's perception that Jimenez began shooting at Woodfox while Woodfox was still in the "V" of his car door.

The City's legal theories are excellent and well articulated. However, the facts in this case are disputed and ultimately this decision rests on the facts rather than the City's meritorious legal argument.

If the bullet strike on the trunk of the car was created by Officer Jimenez's service weapon, the City would be correct to discharge him as his entire story must be false. For the bullet strike to belong to Officer Jimenez's weapon, Officer Jimenez would have had to jump out of his patrol car, pull his service weapon, run west to the right rear corner of Mr. Woodfox's car, and attempt to shoot Mr. Woodfox as he exited his car. If this is what happened, Officer Jimenez should be discharged as Mr. Woodfox – at that time – could not have been reasonably perceived to be threatening Officer Aylworth.¹¹

¹¹ Officer Jimenez should also have been disciplined for poor marksmanship, not being able to shoot a stationary suspect at that range.

However, that is simply not what happened. Sergeant Jordan relied on others to provide him with this information, and Sergeant Jordan was simply given bad information by others. First, this forensic finding would require Officer Jimenez to engage in actions that can only be described as bizarre as he would have had to move west, away from Mr. Woodfox. Second, this action is directly contradicted by the testimony of Officers Aylworth and Jimenez. Critically, I don't have to reconcile the strange nature of this occurrence as the Union's expert witness was extremely credible in describing the impact marks. As stated by Mr. Alexander Jason, a certified senior crime scene analyst specializing in the reconstruction and analysis of shooting incidents:

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7 Q. Do you have any further slides?

8 A. My conclusion on this was that the impact on
9 the trunk lid is not consistent with a .40 caliber
10 bullet. A .40 caliber bullet will make a long surface
11 graze mark or it will perforate the steel. It will not
12 produce a defect like you see in the right there in
13 AJ18, and I think the impact on the trunk lid is
14 consistent with a low-energy bullet, that is lower
15 energy than a .40 caliber. So something like a .32
16 maybe a -3 would produce that, but a .40 caliber cannot
17 produce that.

Officer Jimenez's service weapon was a .40 caliber Glock, and Mr. Jason makes it very clear that Officer Jimenez could not have created the strike mark at issue with his weapon. Mr. Jason's conclusions are further supported by the fact that Mr. Woodfox's car also had shotgun pellet strikes; clearly the Buick in question had been exposed to more than one exchange of gunfire. Unfortunately, this erroneous "fact" may have led some of the decision-makers in this matter (and Sergeant Jordan) to an erroneous conclusion. Once the "fact" surrounding the strike-mark on the trunk has been removed from the equation, both Officer Aylworth's and Officer Jimenez's stories make sense.

As noted above, another "fact" at issue is where Mr. Woodfox was trying to run. A number of witnesses, and common sense, dictate that suspects seeking to flee run away from the police while those seeking to harm officers run toward the police. The City, in its Memorandum to the EFRB, specifically found that:

Woodfox's direction of flight increased the distance between Woodfox and Aylworth providing Jimenez more time to assess Woodfox's actions.

In his deposition, Officer Aylworth was asked about the conclusions Sergeant Jordan drew in the PowerPoint he presented to the EFRB. Specifically, the attorney for Mr. Woodfox's estate asked Officer Aylworth whether Sergeant Jordan's conclusion in his EFRB PowerPoint, that "Woodfox was running away from the police car and did not turn in the direction of Aylworth" was in fact correct. Officer Aylworth testified under oath that Mr. Woodfox was in fact *not* running away from the patrol car when Officer Jimenez discharged his duty weapon.

Officer Aylworth was then asked whether Sergeant Jordan was correct in his conclusion that "the distance between Aylworth and Woodfox was increasing as he ran away." Officer Aylworth testified under oath that "Woodfox was getting closer to [him]." Officer Aylworth was then asked if the distance between him and Mr. Woodfox was increasing at any time prior to the second volley of shots. Officer Aylworth testified that "Woodfox was getting closer to [him]." A totality of the evidence indicates that Mr. Woodfox was not in fact "running away from the police car" as stated in the Memorandum to the EFRB.

This disputed fact was clearly used by the EFRB in making its decision. As stated by Deputy Chief Jeffrey Israel:

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- 17 Q. How did you vote as to the second series of
18 shots?
19 A. Also out of compliance.
20 Q. Why?

21 A. Same reason. Woodfox was moving away from
22 Joel, and it just didn't appear to me that there was
23 any imminent danger that was articulated. Aylworth
24 said he was moving away. Aylworth could see both
25 hands. Grant it that Hector said he could not see both

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1 hands. Someone running away even if he has his hands
2 in his waistband would not be enough to use deadly
3 force, so I didn't think it was imminent danger of
4 either officer being in danger of lethal force, and so
5 there would be no reason to fire on him.

263

24 Q. So he's running northeast?

25 A. Northeast from his car door, which at the

264

1 very beginning puts him obviously running toward -- in
2 the general direction of the police car, but within
3 seconds he is past the police car and running clearly
4 -- I mean, clearly he's trying to get away and not
5 running towards.

Deputy Chief Israel was an extremely impressive witness, however, the conclusion he and the other members of the EFRB drew appears to be based on the information they were presented with. Again, Mr. Woodfox was entitled to run away from the police without being shot; however, if Mr. Woodfox was running in the direction of Officer Aylworth, a reasonable officer would perceive a threat to Officer Aylworth. Based on the information presented in the Powerpoint, Deputy Chief Israel was absolutely correct to find the shooting non-justified; however, the members of the EFRB were simply provided with erroneous information and hence drew erroneous conclusions.

Also critical to the evaluation of Officer Jimenez's conduct is the fact that, when Mr. Woodfox chose the path he took, he passed up other open avenues of escape that would be much more consistent with flight. Mr. Woodfox could have easily (instead of running toward the driver's side of the patrol car) taken a southerly path on Fruitvale Avenue away from Officer

Jimenez and his partner. Sergeant Jordan testified that Mr. Woodfox could have run south on Fruitvale Avenue and into Sanborn Park to get away, or into various alleyways and parking lots depicted on the aerial map.¹² Sergeant Jordan admitted that it could be reasonable for a police officer to conclude that a suspect who passed up other open avenues of escape and, instead ran in the direction of the police, was acting in a challenging manner. Sergeant Jordan was a credible witness and I believe him to be a reasonable officer. Sergeant Jordan stated at the hearing:

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25 Q. Have you ever had suspects flee from you

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1 during your career?

2 A. Yes.

3 Q. And when people are trying to flee they're
4 generally trying to get away from the police; would
5 that be accurate?

6 A. Right.

7 Q. Would it be fair to say that in most
8 cases -- would it be fair to say that Officer Wood --
9 that Officer Jimenez and Officer Aylworth perceived Mr.
10 Woodfox as running towards them?

11 A. Yes. In their general direction, yes.

12 Q. Would it be fair to say that if somebody is
13 trying to get away one would think that they run away
14 from them?

15 A. One would think.

107

23 Q. Can you see how an officer might think that
24 somebody who has passed up other open avenues of escape
25 and run in the general direction of the police might

108

1 think that that's a challenging act? Is that
2 reasonable to conclude?

3 A. That his direction of flight is a
4 challenging act?

5 Q. Yeah, when you're passing up other avenues
6 of escape.

7 A. I guess it could be reasonable to conclude
8 that.

¹² Grievant's Exhibit 3.

For whatever reason, Mr. Woodfox made a decision to run in the general direction of Officer Aylworth. While this decision is irrational, the decision could have been the product of the cocktail of ecstasy, alcohol, and cocaine that Mr. Woodfox had imbibed. Citizens under the influence of ecstasy, alcohol, and cocaine have a right not to be shot by the police; however, behaviors fueled by these drugs may inadvertently cause behaviors that make reasonable police officers fear for their partner's safety.¹³

In the instant case, Mr. Woodfox:

Led Officer Aylworth and Officer Jimenez on a high speed car chase,
Ignored repeated instructions from officers,
Attempted to evade arrest,
Ran towards Officer Aylworth, and,
Jammed his hand in his waistband.

¹³ Mr. Woodfox was also a rather experienced criminal who had been previously arrested for:

(b)(5)(C)

While criminals such as Mr. Woodfox have the same right not to be shot as any other citizen, Mr. Woodfox of all people should have known to run away from the police. While Mr. Woodfox's lengthy criminal history is irrelevant to the objective standard applied in this case, it does show the irrationality of Mr. Woodfox's actions.

Nearly every witness who testified, including Sergeant Jordan, Deputy Chief Breshears, and Captain Fairrow, stated that the waistband is a common area for suspects to hide weapons such as firearms. Officer Jimenez was trained, and his experience dictated, that the waistband is a common receptacle for firearms and other deadly weapons. The deposition testimony of Officer Aylworth and the arbitration testimony of Officer Jimenez support the fact that Mr. Woodfox was shot while his hands were at his waistband. The totality of evidence supports a finding that Officer Jimenez did not discharge his weapon until Mr. Woodfox's hands went to his waistband.

The City argues in its brief that:

However, during his homicide interview, which occurred shortly after the shooting, Jimenez could not say definitively whether Woodfox had just reached toward his waistband, or whether his right hand actually reached into his waistband.

Sgt. Longmire: All right. Did it look as though his hands were actually in his waistband or at his waistband?

Officer Jimenez: I think they were in his waist band.

Sgt Longmire: They were in it. And if you can't say definitively, it's okay.

Officer Jimenez: ...yeah, *I can't say definitively, sir.*
(emphasis in the original)

This argument lacks merit. Officer Jimenez appears to be simply trying to be truthful and is willing to admit that anything is possible. Officer Jimenez "thought" Mr. Woodfox's hands were in his waistband, and no questions were asked about whether it was more likely than not that Mr. Woodfox's hands were in his waistband. The totality of the evidence indicates that Mr. Woodfox's hands went to his waistband; whether they were "in" his waistband or "at" his waistband does not change the analysis as to how a reasonable officer would perceive Mr. Woodfox's intent.

In short, Mr. Woodfox, through his words (none as he ran toward Officer Aylworth ignoring commands to show his hands), body language (running toward an officer while trying to evade arrest), or actions (placing his hands on or at his waistband), indicated an apparent desire to harm Officer Aylworth. With perfect hindsight, we can see that Mr. Woodfox's actions were the product of intoxication, impaired judgment, and incredibly loose-fitting baggy pants.¹⁴ However, as stated in *Graham*, "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."¹⁵ A reasonable officer standing where Officer Jimenez was standing on the night in question would have believed that Mr. Woodfox had the intent to harm Officer Aylworth.

B. Was it Reasonable to Perceive Mr. Woodfox as Having the Means to Threaten Officer Aylworth?

The Department's Training Bulletin dated September 18, 2001, defines high-risk vehicle stops as:

A high risk vehicle stop is a vehicle stop of a person or persons suspected of having committed a serious crime.

A high risk vehicle stop is unpredictable; it is never routine. *Officers should consider any high risk suspect to be armed until they have personally assured themselves otherwise.* (emphasis added)

The City has the ability to set reasonable rules for their employees to follow and to expect that their employees will do as they are trained. In the instant case, the City has chosen to direct their officers to "consider any high risk suspect to be armed until they have personally assured themselves otherwise." Mr. Woodfox was a high-risk suspect, *ergo*; Officer Jimenez had no choice but to consider him to be "armed." Ironically, Officer Jimenez could have been

¹⁴ The above does not even consider the additional factors that the shooting took place at approximately 3:30 a.m. in a section of Oakland that is considered 'high crime' and where calls for narcotics, firearms, assault, and domestic violence are regularly reported.

¹⁵ *Graham*, 490 U.S. at 396.

disciplined for disregarding his employer's instructions if he had failed to assume that a high-risk suspect such as Mr. Woodfox was armed. Simply put; "if an employee is permitted to willfully disregard a direct order, it would result in chaos in the work place. When an employee refuses to perform the work ordered by his/her supervisor, it is recognized as insubordination by the great majority of arbitrators."¹⁶ Officer Jimenez works for a paramilitary organization and is trained to follow orders; it is well established that "refusing a direct order from a supervisor is an action that is so clearly wrong that specific reference is not necessary."¹⁷

Choosing to disregard his training is not a decision Officer Jimenez can make on his own. In the less than three seconds that elapsed from Mr. Woodfox leaving his car until he collapsed, Officer Jimenez had little, if any, time to think. Instead of thinking and rationalizing, Officer Jimenez simply relied on what he had been taught and how he had been trained; he had been taught and trained to "consider any high risk suspect to be armed."

It is inherently reasonable for a police officer to rely upon his training and his employer's directives. Sergeant Jordan agreed that officers are trained to assume that suspects in high-risk stops are armed and stated:

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- 2 Q. Fair enough. I'm going to jump around
3 again, and I apologize. Back to the high-risk car
4 stops.
5 Are you familiar with a portion of the
6 high-risk car stop policy that says that officers are
7 to assume that suspects in high-risk car stops are
8 armed until they personally assure themselves
9 otherwise?
10 A. Yes.
11 Q. And you acknowledge that's part of the
12 training that officers receive, correct?
13 A. Yes. Yes, sir.

¹⁶ *U.S. Dep't of the Army*, 125 LA 1287 (2008).

¹⁷ *U.S. Dep't of the Army*, 125 LA 1287 (2008).

The City now argues, "It was also unreasonable for Jimenez to assume that Woodfox had a weapon in his waistband because he did not have a clear view of Woodfox's waistband."

Even assuming that Woodfox reached *into* his waistband, it was not reasonable for Jimenez to assume that Woodfox was reaching for a gun with the intent to inflict serious harm. Suspects might reach for their waistband for any number of reasons. They could be reaching for another type of weapon. (Tr. at 316:22-23.) The suspect could be reaching for a weapon with the *intent to discard it*. (*Id.*, at 255:4-17.) Jimenez himself testified about a prior incident in which a known gang member reached into his waistband, pulled out a gun, and eventually discarded the weapon as he fled from the police. Jimenez did not shoot this individual. Thus, Jimenez had *personal experience* of a suspect reaching for his waistband and pulling out a gun without the intent to use it to harm officers.

The City fails to mention that in Officer Jimenez's previous encounter with an armed suspect, the suspect had been running away from him. The analysis in this case is identical; if Mr. Woodfox had been running away from the officers, rather than at Officer Aylworth, Officer Jimenez would have had no reason to discharge his duty weapon. Further, the City is correct that it was possible that Mr. Woodfox could have been reaching for a weapon other than a gun when Officer Jimenez made the decision to discharge his weapon. However, it makes no difference as to whether Mr. Woodfox would have been reaching for a knife, shurikens, or a blow gun with curare-tipped darts. All are weapons, and all would have made it reasonable for Officer Jimenez to perceive Mr. Woodfox as having the means to threaten Officer Aylworth.

The City is correct that: "Even if a suspect is running toward an officer and reaching for the waistband area, this is not enough to infer an imminent threat sufficient to justify the use of lethal force." However, if that individual is disobeying an officer's commands during a high-risk car stop, officers should consider the suspect to have the means to create an imminent threat as "officers are cautioned, taught, and trained to consider a high risk suspect to be armed until they have personally assured themselves otherwise."

C. Was it Reasonable to Perceive Mr. Woodfox as Having the Opportunity to Threaten Officer Aylworth?

The City defines "opportunity" as: "The time and/or place which allowed the subject to use the means to cause injury." Sergeant Jordan testified:

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20 A. Because as to use -- to use lethal force you
21 are required to -- to have the intent, the ability, the
22 means and the opportunity to complete that threat. And
23 in this situation we had the opportunity. The officers
24 were present. The suspect was present. The ability,
25 there's no testimony that Mr. Woodfox was injured or

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1 disabled at the beginning of this incident, so the
2 ability was there.

...

17 point. And, again, we would have the opportunity. All
18 the officers are there, Mr. Woodfox is there. The
19 ability, he's -- per Officer Aylworth's testimony he
20 appeared to be -- had appeared to be shot, his motions
21 were slowed, but if he still had a firearm he could
22 possibly still shoot it, so the ability was there.

Clearly, the opportunity prong of the imminent threat analysis is not at issue in this case due to the close proximity between Mr. Woodfox and Officer Aylworth.

D. Was it Reasonable to Perceive Mr. Woodfox as Having the Ability to Threaten Officer Aylworth?

As stated by Sergeant Jordan at the hearing; "The ability, there's no testimony that Mr. Woodfox was injured or disabled at the beginning of this incident, so the ability was there." Based on the photographs of Mr. Woodfox, he appeared to be young, fit, and in shape; in short, the type of individual who could move quickly and have the ability to harm Officer Aylworth.

III. Issues Surrounding the Community's Trust in the Department.

In its brief, the City makes several arguments that relate to the public perception of the Oakland Police Department by the community. Arguments made by the City include:

Finally, the Department continues to struggle to regain, and maintain, the community's trust after facing allegations in the *Riders* class action lawsuit that officers arrested citizens using excessive force and other questionable police tactics.... However, segments of the community remain wary of OPD officers. The Oakland community is also still haunted by the memory of BART police officer Johannes Mehserle's shooting of Oscar Grant.... Reinstating an officer who shoots an unarmed man in the back would only add to the community's apprehension about the police officers in Oakland.

I agree that it is unfortunate that some members of the public in Oakland distrust the Department and I have great sympathy for the family of Oscar Grant.¹⁸ However, sacrificing Officer Jimenez on the altar of public opinion will not bring back Mr. Grant, Mr. Woodfox, or the trust of the people of Oakland.

IV. The Penalty – Was Termination Justified?

In the instant case, the City has chosen to terminate Officer Jimenez. As stated in *Paperworkers v. Misco*:

Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct. In *Enterprise Wheel*, for example, the arbitrator reduced the discipline from discharge to a 10-day suspension. The Court of Appeals refused to enforce the award, but we reversed, explaining that though the arbitrator's decision must draw its essence from the agreement, he "is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*"¹⁹

As traditionally applied in labor arbitrations, the "just cause" standard of review requires consideration of whether an accused employee is in fact guilty of misconduct. "An employer's good faith but mistaken belief that misconduct occurred will not suffice to sustain disciplinary action."²⁰

¹⁸ I also grieve for the family of Mr. Woodfox and regret his untimely death.

¹⁹ *Paperworkers v. Misco*, 484 U.S. 29, 41 (1987) (quoting *United Enterprise Workers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)) (emphasis added by the *Paperworkers* Court). *Paperworkers* was also quoted by this arbitrator in *County of Monterey*, 127 LA 207 (2009), in which the termination of a deputy sheriff was upheld.

²⁰ *Rabanco Recycling*, 118 LA 1411 (2003).

Again, in this case, the City provided an excellent brief and was correct as to all of its legal theories. However, the facts posited by the City are not supported by a preponderance of the evidence. As Officer Jimenez has not violated the City's Use of Force Policy, his termination must be rescinded and he should be returned to duty as soon as practical. A police officer challenging his wrongful dismissal is entitled to back pay,²¹ and Officer Jimenez is to be made whole for his losses.

CONCLUSION

In short, the City bore the burden to show, by at least a preponderance of the evidence, that Officer Jimenez violated the Memorandum of Understanding or an appropriate City rule. In the instant case, despite the excellent lawyering of the City's attorney, I have found that a preponderance of the evidence supports a finding that Officer Jimenez complied with the City's policies. If the totality of evidence would have indicated that Mr. Woodfox was running away from Officer Aylworth, this decision would have been different. If Officer Jimenez had not been trained that "Officers should consider any high risk suspect to be armed until they have personally assured themselves otherwise," this decision might have been different.

I commend the City of Oakland for the hard work of their employees in this matter. Sergeant Jordan and Deputy Chief Israel were both impressive witnesses who made correct decisions based on the information they were given. I also commend the Oakland Police Officers' Association for the effort and expense of using this process to clear Officer Jimenez who had to make a number of difficult decisions, under difficult circumstances, in less than three seconds.

²¹ *Parker v. City of Fountain Valley* 127 Cal.App.3d 99 (1981). See also, e.g., *Davis v. Civil Service Comm'n.*, 93 Cal.App.3d 417 (1979) (affirming the trial court's issuance of writ of mandate ordering back pay benefits for the period between employee's discharge and the due process hearing which upheld the discharge); *Fugitt v. City of Placentia*, 70 Cal.App.3d 868, 876 (1977) ("Mandamus is proper to compel the payment of back salary to a (public) employee for the period during which he was wrongfully discharged.")

AWARD

The grievance is sustained. The Employer will rescind the Grievant's discharge and he shall be reinstated within fourteen days of this decision and be made whole for any loss of pay or benefits from his time of discharge until February 6, 2011.²² This award is final on all issues other than back pay or other damages. The make-whole remedy is provisional and becomes final forty-five days from today's date in order to allow the parties to address any issues involving implementation or calculation of the award.

All fees and expenses charged by the Arbitrator shall be divided equally between the parties, as provided in Article X, Section C.5. of the parties' Memorandum of Understanding.

/s/ David Gaba
David Gaba, Arbitrator
March 2, 2011
Seattle, Washington

²² The February 6, 2011, date arises as a result of the Union agreeing to toll back-pay in exchange for an extension in the briefing schedule.